

1 THE HONORABLE JAMES L. ROBART
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 vs.

12 MOTOROLA, INC., et al.,

13 Defendants.

14 MOTOROLA MOBILITY, INC., et al.,

15 Plaintiffs,

16 vs.

17 MICROSOFT CORPORATION,

18 Defendants.

Case No. C10-1823-JLR

**MICROSOFT'S MOTION TO
AMEND PROTECTIVE ORDER TO
ALLOW DESIGNATED IN-HOUSE
COUNSEL EXPANDED ACCESS TO
CONFIDENTIAL BUSINESS
INFORMATION**

**NOTE ON MOTION CALENDAR:
Thursday, September 13, 2012**

19 **I. INTRODUCTION**

20 Microsoft respectfully requests an amendment to the Protective Order in this case (ECF
21 No. 72) to allow T. Andrew Culbert and K. McNeill Taylor, Microsoft's and Motorola's
22 respective in-house counsel who have been ordered to sign all pleadings and motions filed by
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1 the parties, to have the same access to Confidential Business Information ¹ as the parties'
 2 outside counsel, subject to the same restrictions on use and disclosure.

3 Paragraph 3 of the Protective Order provides the parties' outside counsel, court
 4 reporters, technical experts and the Court with unfettered access to all evidence. Paragraph 4
 5 prohibits disclosure of Confidential Business Information, except as authorized, and requires
 6 that any such information be used "solely for purposes of this action."

7 Paragraph 6 allows two in-house counsel for each party limited access to confidential
 8 materials. Microsoft designated Culbert and David Killough as its designated representatives
 9 subject to the Protective Order, and Motorola designated Tom Miller and Richard Wulff.
 10 Protective Order, ¶ 6. Motorola did not designate Taylor.² These individuals are permitted
 11 access to:

12 Confidential Business Information contained in responses to interrogatories,
 13 answers to requests for admission, submissions to the Court, expert reports
 14 (exclusive of exhibits and source code excerpts), opinions and orders of the
 Court...
 15 but are not permitted to view "Confidential Business Information pertaining to licensing or
 16 other financial information...." *Id.* In practice, this restriction has meant that Motorola's
 17 various submissions have required substantial redaction before they could be forwarded to
 18 Culbert and Killough. Frequently, much of the substance has been lost in translation, impeding
 19 their ability to assist in the preparation of Microsoft's case.

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21 ¹ "Confidential Business Information" is defined in the current Protective Order as "information which has not
 22 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 23 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure
 and Use of Discovery Materials (ECF No. 72), ¶1.

24 ² Under the operative Protective Order, Taylor is not permitted to review any document, including discovery
 25 responses and expert reports, identified as containing "Confidential Business Information" under the Protective
 Order, even in redacted form, because he was not designated as one of the Motorola in-house attorneys to whom
 such access was granted.

1 By order dated January 24, 2012, the Court required that the parties each designate one
 2 in-house attorney to sign every substantive filing by the parties. Microsoft designated Culbert,
 3 and Motorola designated Taylor. By signing pleadings and motion papers, Culbert and Taylor
 4 have assumed the responsibilities set forth in Fed. R. Civ. P. 11 regarding the evidentiary
 5 support for the contentions made in the parties' respective submissions.

6 In order to fully discharge the responsibilities they assume by signing submissions,
 7 Culbert and Taylor need access to the relevant evidence underpinning the submission. For this
 8 reason, Microsoft respectfully requests that the Court amend the Protective Order to permit
 9 Culbert (and Taylor) to have the same access as outside counsel for the parties under Paragraph
 10 3 of the Protective Order.

11 II. ARGUMENT

12 A. **The Protective Order Should Be Amended to Allow Culbert and Taylor Access to** **All Relevant Evidence.**

13 By order dated January 24, 2012, the Court required Culbert to sign each substantive
 14 filing by Microsoft. Taylor similarly was directed to sign Motorola's filings. Pursuant to Rule
 15 11, by signing pleadings, motions, or other papers to be submitted to the Court, counsel make
 16 certain representations, including that:

- 17 (3) the factual contentions have evidentiary support or, if specifically
 so identified, will likely have evidentiary support after a reasonable
 opportunity for further investigation or discovery; and
- 18 (4) the denials of factual contentions are warranted on the evidence or,
 if specifically so identified, are reasonably based on belief or a lack
 of information.

22 *Id.* As such, attorneys subject to the requirements of Rule 11 – whether in-house or outside
 23 counsel – must have access to all evidence supporting (or contradicting) the submissions to the
 24 Court which they sponsor so that they may comply with Rule 11's requirements.

1 While certain documents produced in discovery may contain the parties' confidential
 2 licensing information, the terms of the Protective Order are sufficient to protect the parties'
 3 business interests, even if Culbert and Taylor were treated as outside counsel. They will be
 4 permitted to disclose Confidential Business Information only to those persons specifically
 5 authorized by the Protective Order. Protective Order, ¶ 3. They will not be permitted to
 6 disclose this information to others at Microsoft or Motorola, or use this information for any
 7 purpose other than for this litigation – namely, to assist outside counsel in preparation for trial
 8 and remaining pre-trial motion practice.

9 On behalf of Microsoft, Culbert (along with Killough) has been intimately involved in
 10 all aspects of this case. He is counsel of record and an integral part of Microsoft's litigation
 11 team. He has executed Attachment A to the Protective Order, signifying his agreement to use
 12 confidential business information only for purposes of this litigation and not to use or disclose
 13 any Motorola or third-party confidential business information except as authorized. There is
 14 no reason to believe that allowing full access to the evidence in this case would lead to a
 15 violation of these commitments.

16 One result of the current application of the Protective Order is heavy redaction of both
 17 parties' expert reports before they can be given to Culbert. This part of the "evidence"
 18 assumes increasing importance as immediate pretrial motions are prepared related to those
 19 expert reports.

20 For this and other reasons, the Protective Order should be amended to permit, at
 21 minimum, Culbert (and Taylor for Motorola) to have the same access to the evidence as
 22 outside counsel for the parties.

23 **B. The Requested Amendments Will Not Cause Any Undue Prejudice.**

24 Motorola cannot realistically claim it would be prejudiced by the proposed amendments
 25 to the Protective Order. While Microsoft recognizes that certain documents produced in

1 discovery may contain the parties' confidential licensing or financial information, the amended
 2 Protective Order still would sufficiently protect the parties' business interests. Culbert and
 3 Taylor would be permitted to disclose Confidential Business Information only as authorized by
 4 the Protective Order. They would not be permitted to disclose this information to others at
 5 Microsoft or Motorola, or use this information for any purpose other than for this litigation.
 6 The evidence would be used to assist outside counsel in preparation for trial and remaining
 7 pre-trial motion practice.

8 Further, the Protective Order already contemplates that, under certain circumstances,
 9 even the parties' most sensitive confidential business information can be disclosed to those in-
 10 house attorneys specifically identified in the Protective Order – Culbert, Killough, Miller and
 11 Wulff. The Protective Order provides that these designated in-house counsel "*shall not be*
 12 *excluded from any confidential portion of the trial or other in-Court proceedings in this case.*"
 13 *Id.*, ¶ 7 (emphasis supplied). Thus, Culbert, Killough, Miller and Wulff may remain in the
 14 Courtroom during any argument or presentation concerning the terms of the parties' licensing
 15 agreements with third parties, financial information, or any other confidential matters.
 16 Allowing Culbert and Taylor access to this same material when it appears in pre-trial papers
 17 discloses substantively no more than the parties already have agreed may be disclosed in the
 18 courtroom to the in-house counsel identified in the Protective Order. Any third party who had
 19 provided documents subject to the Protective Order was similarly apprised of such courtroom
 20 access.

21 Culbert regularly has been in the courtroom when outside counsel debated the details of
 22 confidential evidence – details he was hearing for the first time. Culbert should be permitted
 23 not only to *hear* presentations about confidential evidence, but also to help *develop* them. This
 24 is especially true given that many of these arguments are based on evidence cited in briefs he
 25 signed as counsel of record for Microsoft.

1 The requested amendments to the Protective Order will allow the parties to more
2 efficiently and effectively prepare for the RAND trial and will provide Culbert with full
3 information regarding the issues underlying impending motions in limine and *Daubert*
4 motions. Treating all counsel who sign pleadings and motions the same (i.e. as outside
5 counsel) would simplify the parties' preparation and presentation of their cases immensely.
6 while still maintaining appropriate safeguards against improper use or disclosure of
7 confidential material.

III. CONCLUSION

9 For the reasons set forth herein, Microsoft respectfully requests that the Court amend
10 the Protective Order. A proposed amended Protective Order is attached hereto as Exhibit A. A
11 red-lined version showing the proposed amendments is attached hereto as Exhibit B.

12 DATED this 13th day of September, 2012.

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C10-1823

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
 2. On the 13th day of September, 2012, I caused the preceding document to be on counsel of record in the following manner:

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DATED this 13th day of September, 2012.

6 _____
7 s/ Linda Bledsoe
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